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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 183.

B. H. Inness Brown, David Paine, Ethelbert Warfield, J. Fearon Brown, George Koegler, and Murray MacElhinny, individually and as co-partners under the firm name of Kellogg, Emery & Inness-Brown,

and

Lawrence S. Greenbaum, Edward S. Greenbaum, Herbert A. Wolff, Morris L. Ernst, Jonas J. Shapiro, Wallace D. Jennings, Samuel J. Schur and Alexander Lindey, individually and as co-partners under the firm name of Greenbaum, Wolff & Ernst,

Petitioners,

—against—

John Gerdes and James D. Carpenter, Jr., Trustees of Reynolds Investing Co., Inc., Debtor,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

BRIEF OF REORGANIZATION TRUSTEES IN OPPOSITION TO PETITION.

JOHN GERDES,
JAMES D. CARPENTER, JR.,
As Trustees of Reynolds Investing Company, Inc., Debtor, Pro Se, Respondents.

John Gerdes,
Mary-Chase Clark,
Of Counsel.

August 31, 1943.

The Court Press, N. Y. C.

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BRIEF OF REORGANIZATION TRUSTEES IN OPPOSITION TO PETITION.

Opinions Below.

The opinions of the state Supreme Court appear on pages 98 to 113 of the record and are not officially reported. The Appellate Division wrote no opinion. The

opinion of the state Court of Appeals and dissent appear on pages 124 to 129 of the record, and are reported in 290 N. Y. 468.

Statutes Involved.

The provisions of the Bankruptcy Act and other federal and state statutes involved, are set forth in the Appendix to this brief.

Outline of Case.

This Court is asked to review the refusal of the New York court to fix the compensation to be paid to attorneys appointed by a federal district court in a reorganization proceeding under the Bankruptcy Act to bring and prosecute suits in a state court upon causes of action constituting assets of the estate of the debtor.

The reorganization Trustees, under authority conferred by the federal reorganization court, opposed the fixing of the Attorneys' fee by the state court on the following grounds:

1. The Attorneys had entered into an express and implied contract that the amount of their fee would be fixed by the federal reorganization court.

2. Even if there had been no contract binding the Attorneys to the fixation of their fee by the federal reorganization court, such court has exclusive jurisdiction over the fixing of allowances to attorneys appointed by it to prosecute, in behalf of debtors in possession or trustees,

causes of action which are assets of the estate of the debtor.

3. The Attorneys are bound by the plan of reorganization—approved, confirmed and consummated with their active approval and consent—which expressly provides that their fee is to be fixed by the federal reorganization court. The plan, and order confirming it, are *res judicata;* they cannot be attacked collaterally in a state court.

The state Court of Appeals held:

1. That the Attorneys had bound themselves by contract to permit the federal reorganization court to fix the value of their services; and

2. That even if there were no contract to that effect, the federal reorganization court had exclusive jurisdiction, under the Federal Constitution, the Bankruptcy Act, and other federal statutes, to fix the reasonable value of the services of attorneys appointed by it to assist in the administration of an estate in reorganization proceedings under the Bankruptcy Act.

As its decision on the two foregoing matters determined the issues, the state Court of Appeals did not pass upon the question as to whether the plan of reorganization and the order confirming it could be attacked collaterally in a state court.

Facts.

A petition for the reorganization under Section 77B of the Bankruptcy Act of Reynolds Investing Company, Inc. (hereinafter called the Debtor) was filed on May 18, 1938, in the United States District Court for the District of New Jersey (R. 11). The petition was approved, and the Trustees were appointed on January 19, 1939 (R. 12), under the provisions of Chapter X of the Bankruptcy Act (Chandler Act) which had become applicable to the proceeding on September 22, 1938 (Bankruptcy Act, section 276c(1)).

After jurisdiction had been conferred on it by the filing of the petition, the reorganization court made an order (dated August 1, 1938) appointing the Attorneys, as attorneys for the Debtor, to institute and prosecute in the New York courts certain claims in favor of the Debtor against its former officers, directors and others (R. 12). Action in the New York court was started August 4, 1938 (R. 12). After their appointment, the Trustees, by order dated February 10, 1939, were substituted as parties plaintiff in place of the Debtor (R. 12).

In November 1939 the Attorneys, who were also the attorneys for the two most important creditor and stockholder committees in the reorganization proceeding,* approved the plan of reorganization proposed by the Trustees and urged the Court, creditors, stockholders, and other interested parties, to approve and accept the plan (R. 30). The plan so approved expressly provided that the federal reorganization court retained jurisdiction

* The Attorneys received $36,000 in allowances from the reorganization court for their services as attorneys for these committees (R. 26).

to "fix the reasonable compensation" to be paid to the Trustees, and their attorneys or counsel, for services in the prosecution of" the claims being prosecuted in the New York court by the Attorneys (R. 29).

Some changes were made in the plan originally proposed by the Trustees in October 1939 and approved by the Attorneys in November 1939, but no change was ever requested or made in the provisions which reserved to the federal reorganization court jurisdiction over the determination of the value of the Attorneys' services. The plan of reorganization, which was confirmed (R. 31) by the court by order dated June 17, 1940, and fully consummated* in 1940 (R. 30), contained the same reservation of jurisdiction of the federal organization court over the fixing of the compensation of the Attorneys for their services in the state court (R. 52).

The Attorneys performed most of the services for which they seek compensation *after* they had approved the plan, and after the plan had been confirmed and consummated. They prepared for trial, conducted a six weeks trial in the New York court during the early part of 1941, conducted hearings before a state court referee in the summer of 1941, and entered judgment in favor of the Trustees in the state court in November 1941 (R. 14, 15).

In June 1941 the Trustees, under authority from the federal reorganization court, notified the Attorneys that after the Attorneys completed the reference then pending and entered judgment in the action, their services for

* The proceeding was terminated, except for the reserved jurisdiction of the reorganization court and the Trustees over the claims being prosecuted by the Attorneys, and other unsettled or unadjusted claims of the Debtor and its estate, as required by Section 216(13) of the Bankruptcy Act.

the Trustees were to discontinue (R. 22, 23). No other attorneys were substituted in the New York action for the Attorneys. The Trustees did not appear *pro se* therein. They settled for $150,000 the judgments entered by the Attorneys in favor of the Trustees in the New York action against the principal defendants (because the defendants had no assets which would enable collection of a larger amount) with the approval of the federal reorganization court after hearings upon notice to the Attorneys, the Securities and Exchange Commission, all creditors and stockholders, and other parties in interest. This sum of $150,000 is being held in escrow for the satisfaction of such claim as the Attorneys may finally establish in either the state or federal court.

The Trustees made a motion in the federal court to compel the Attorneys to deliver to the Trustees the papers and exhibits in the New York actions. The Attorneys contested the jurisdiction of the federal court and asserted that the New York court had exclusive jurisdiction.

Following the suggestion of this Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, at page 345 (that the federal court might well instruct its trustee in bankruptcy "to request the state court to recognize the exclusive jurisdiction of the" federal court "before taking final action"), the Trustees, with the consent of the federal court, withdrew their motion in the federal court under a written stipulation (R. 24-26) which permitted the Attorneys to present the questions to the state court, with an express reservation of the right of the Trustees to question the jurisdiction of the state court (R. 26).

A proceeding was brought by the Attorneys in the state court to fix the value of their services and to enforce a lien for such amount. The lower state court

fixed $100,000 as the value of such services, and added $2,250 for interest from November 27, 1941 to April 15, 1942, the date of the entry of its order (R. 7). When it fixed these amounts the state court knew that a proceeding was pending before the federal court to settle for $450,000 the judgments against the principal defendants (R. 93).

The state Appellate Division affirmed the lower court, without opinion. The state Court of Appeals reversed, and dismissed the proceeding.

After instituting the principal action in the New York court, and after the appointment of the Trustees under Chapter X, the Attorneys were authorized to bring two additional actions in behalf of the Trustees in the New York court: the action designated as Action No. 2, and the action designated as the Globe Action.

There was no substitution of attorneys or of the Trustees *pro se*, and no application for such substitution, in Action No. 2. The action—which involved some of the defendants who were defendants in Action No. 1—was settled in conjunction with the settlement of Action No. 1. The aforesaid sum of $150,000 is also held in escrow for the protection of any claim which may be established by the Attorneys for services in Action No. 2. The allowance by the lower state court for such services was $2000.

The Globe action has been abandoned. Neither the Attorneys nor the Trustees believe that there is a reasonable prospect of recovery. No substitution or application for substitution of attorneys or of the Trustees *pro se* has been made. Nothing has been done in the action since the Attorneys discontinued their services. The fund of $150,000 is also held for the satisfaction of any

claim which may be established by the Attorneys for their services in this action.' The allowance to the Attorneys by the lower state court for their services was $750.

Error in the Record.

An important error appears in the record on page 124. It is stated, as part of the official report of the opinion of the Court of Appeals, that the appeal to the Court of Appeals was "on constitutional grounds from an order of the Appellate Division". The correct statement, as found in the official reports, *Matter of Brown (Gerdes)*, 290 N. Y. 468, is: "Appeal, by permission of the Court of Appeals, from an order of the Appellate Division."

The New York practice permits appeals to the Court of Appeals as of right (on constitutional questions), or by permission of the Appellate Division or the Court of Appeals (in which case the Court of Appeals is not restricted to the consideration of constitutional questions).

The Trustees appealed both as of right and with the permission of the Court of Appeals. The Court considered local state questions of law as well as constitutional questions.

Trustees' Position and Summary of Argument.

(1) As to questions of local state law:

The state court disposed of the claim of the attorneys, as a matter of local state law, by holding (a) that the Attorneys had agreed that their compensation would be

fixed by the federal reorganization court and (b) that this contract had not been abrogated by any wrongful discharge of the Attorneys before the completion of their services. The federal questions are moot.

(2) As to questions of federal law:

(a) The federal question of jurisdiction is moot because the Attorneys are bound by the plan of reorganization and the order confirming it, both of which provide that the federal court shall fix the fee of the Attorneys. The federal court order and plan are *res judicata* and cannot be attacked collaterally in a state court.

(b) The state court correctly held that the federal court has exclusive jurisdiction even if no contract or plan expressly gives it such jurisdiction.

(c) There is no conflict between the decision of the state court herein and applicable decisions of this and other federal courts.

POINT I.

The questions of local state law are determinative of the issues. The federal questions are moot.

In their brief, the Attorneys ignore completely the primary issue in this case. The primary issue is not as to whether a state court may enforce a lien for services rendered by attorneys in a state court action, but whether the state court, in determining the amount for which a lien, if any, shall be enforced, *must* disregard the con-

tract of the Attorneys under which they agreed that the amount of their compensation would be fixed by the federal reorganization court.

The Attorneys do not require a lien to insure payment of their fee. The assets are ample, and the plan makes adequate provision for such payment. What the Attorneys desire is that the state court disregard their contract and determine the amount of their claim as though there were no contract.

Section 475 of the New York Judiciary Law gives a lien only in an amount determined as provided in the contract of the attorneys. Section 474 of the New York Judiciary Law provides: "The compensation of any attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law," except where the contract is made by the attorney with the guardian of an infant.

The Attorneys herein agreed to the fixation of their compensation by the federal reorganization court.

The plan of reorganization provides (R. 52):

> "All claims in favor of the Debtor or of the Debtor's estate not settled or adjusted in the reorganization proceedings, or in the plan, or in connection with the consummation of the plan, shall be retained and enforced by the Trustees. * * *

> "The Court will retain continuing jurisdiction over such claims and the prosecution thereof * * * The Court will from time to time fix the reasonable com-

* These provisions are required by sections 216(13) and 221(4) of the Bankruptcy Act.

pensation to be paid to the Trustees, *and their attorneys or counsel*, for services in the prosecution of such claims, * * *"*

The Attorneys approved the plan as early as November, 1939, and urged the creditors and stockholders represented by them to approve and accept it (R. 30).** The plan was confirmed by order dated June 17, 1940, and was consummated in 1940, with the active support of the Attorneys (R. 30).**

As the Attorneys approved the provisions of the plan, under which it was specified that their fees would be fixed by the federal court, before they conducted the trial of the New York action or performed the most important part of their services, the condition that their fee be fixed by the federal court was a part of their contract with the Trustees and the federal court. The state Court of Appeals so held (R. 128):

> "It is unnecessary to consider whether it was within the power of the [reorganization] court to surrender this jurisdiction, since it would appear that both as a matter of law and as a matter of fact the retainer of these attorneys was subject to the condition that the amount of any fees would be fixed by the United States District Court."

In addition, when the Attorneys accepted appointment by the federal court, the statutory provisions requiring the federal court to fix their fees became, by implication,

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* These provisions are required by sections 216(13) and 221(4) of the Bankruptcy Act.

** These allegations in paragraphs 11 and 12 of the Trustees' answer were expressly admitted in the reply of the Attorneys (R. 68).

a part of their contract. In its opinion the New York Court of Appeals said (R. 126):

> "Also, since these attorneys were appointed by the court in this reorganization proceeding and nothing was said as to fees, the services of the attorneys were undertaken subject to all the provisions of the Bankruptcy Act with respect to the compensation for such services. * * * Under such circumstances, even if no exclusive jurisdiction had been given to the Federal Court, the attorneys would in the normal course return to have their compensation fixed by the court by whom their appointment had been made."

In the state court the Attorneys conceded that if there were no wrongful discharge of the Attorneys by the Trustees, the state court would have no jurisdiction to fix their compensation. But they contended that under the state law they had been wrongfully discharged by the Trustees, and that such discharge abrogated their contract that the federal reorganization court was to fix their compensation, and gave jurisdiction to the state court.

The precise position taken by the Attorneys is shown by the following quotation from pages 7 and 8 of their brief on their motion for a reargument in the state Court of Appeals:

"POINT I.

IN STATING AND ASSUMING THAT RESPONDENTS HAD FULLY PERFORMED THEIR SERVICES, THE MAJORITY OF THIS COURT MISAPPREHENDED AND OVERLOOKED THE RECORD FACTS AND THE FINDINGS OF BOTH COURTS BELOW, AND THEREBY MISCONCEIVED THE FUNDAMENTAL ISSUE

ON THIS APPEAL AND THE DIRECT APPLICABILITY OF *Sherman* v. *Buckley* UPON WHICH THE MINORITY OF THIS COURT RELIED.

"Judge Finch, in the prevailing opinion, states that respondents fully performed the services for which they were retained. On that assumption he deems the issue presented on this appeal to be whether the New York Court had the power to grant an allowance to respondents for such completed services, and concludes that exclusive jurisdiction resided in the Bankruptcy Court. The facts as found by both courts below, however, are that respondents were discharged prior to the full performance of their services, that the actions which they were retained to prosecute were not completed and that appellants sought to substitute themselves in place of respondents in the pending New York actions.

"The issue on this appeal, therefore, is not whether the State Court has jurisdiction to grant allowances in general to attorneys appointed by the Bankruptcy Court after services have been completed by such attorneys. On that proposition there is no dispute; where an attorney appointed by a Bankruptcy Court has completed his work, the fixing of his compensation and the granting of allowances are made by the Bankruptcy Court and all the provisions of the Bankruptcy Act referred to by Judge Finch, relating to allowances to attorneys in the Bankruptcy Court, become effective.

"The issue before this Court is as follows:

"Where a company in bankruptcy, and its trustees, with the approval and by the direction of the Bankruptcy Court, retain New York attorneys and commence suits in the courts of that State to enforce claims of the bankrupt estate, and the Trustees thereafter discharge the attorneys before they have completed their services or seek to substitute them

selves, *pro se* or others as their attorneys, does the New York Court have jurisdiction *in rem* to fix the lien of the discharged attorneys upon the causes of action in New York and the proceeds thereof?

"Thus the question whether respondents were in fact discharged is fundamental."

The Court of Appeals reaffirmed, by denying the motion for reargument, its finding that, as a matter of local state law, the Attorneys had not been wrongfully discharged, but had been permitted fully to perform the services for which they had been employed. The Court said (R. 128):

"* * * the attorneys herein were permitted fully to perform the services for which they were appointed, namely to reduce the claims to judgment. * * *".

The state Court of Appeals held, as a matter of state law, that the Attorneys were bound by contract to have their fee fixed by the federal court. It also held, as a matter of state law, that the contract had not been abrogated by a wrongful discharge of the Attorneys. The federal jurisdictional question is therefore moot and not decisive.

POINT II.

The federal question of jurisdiction is moot because the Attorneys are bound by the plan of reorganization and the order confirming it, both of which provide that the Federal Court shall fix the fee of the Attorneys. The Federal Court order and plan are *res judicata* and cannot be attacked collaterally in a state court.

The plan of reorganization provides that the federal reorganization court retains jurisdiction to "fix the reasonable compensation to be paid to the Trustees, and their attorneys or counsel, for services in the prosecution of" the claims prosecuted by these Attorneys (R. 52).

The plan also provides only for the payment of claims of creditors which have been proved in the proceedings and for the payment of such reorganization debts and expenses as are allowed by the federal reorganization court (R. 37, 55).

The order confirming the plan of reorganization provides that costs and expenses of administration shall be paid only if approved by the reorganization judge after a hearing upon proper notice under the Bankruptcy Act (R. 66).

The Attorneys are bound by the foregoing provisions of the plan and of the order confirming the plan. They were parties to the reorganization proceeding. They participated in the formulation of the plan and order of confirmation. They urged the court and the security

holders' committees represented by them to approve and accept the plan and the order confirming it. Their time to appeal has long since expired.

Even if the federal reorganization court had acted beyond its power in confirming a plan containing these provisions—as was not the case—the Attorneys are bound by the plan and the order which confirmed it, which are *res judicata* as to them. They cannot attack the plan or order collaterally in a state court. *Stoll* v. *Gottlieb*, 305 U. S. 165.

POINT III.

The state court correctly held that the federal court has exclusive jurisdiction even if no contract or plan expressly gives it such jurisdiction.

In addition to holding that the Attorneys were bound under applicable state law by the terms of their contract, which provided for the fixing of their fees by the federal reorganization court, the Court of Appeals held that the federal reorganization court would have had exclusive jurisdiction to fix the fees of the Attorneys even if there had been no contract binding them to such fixation. In so holding, the state court merely followed the clear mandate of the Bankruptcy Act, the Federal Judicial Code, and the decisions of this Court and other federal courts.

It would be extremely difficult to improve upon the learned statement on this point of Judge Finch in the opinion of the New York Court of Appeals (R. 125-129):

"[fol. 191] It is submitted that the Federal court in

a reorganization proceeding has exclusive jurisdiction to award fees to attorneys appointed by it in payment of services to the bankrupt estate in the collection of claims in a State court. The Congress has power to make uniform laws upon the subject of bankruptcy. (U. S. Const., art. I, §8, clause IV.) In the National Bankruptcy Act the Congress has set up a comprehensive system of bankruptcy administration and conferred exclusive jurisdiction upon the Federal courts. Chapter 10 of the Act (Bankruptcy Act, §§111, 114), under which this reorganization proceeding expressly confers upon the United States District Court 'exclusive jurisdiction of the debtor and its property wherever located'. This is reenforced by the specific provision that State courts shall have no jurisdiction over bankruptcy matters. (Federal Judicial Code, §256; see, also, *Gross* v. *Irving Trust Co.*, 289 U. S. 342, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.) Not only does chapter 10 specifically confer exclusive jurisdiction of the debtor and its property upon the Federal court, but in addition there is specifically given exclusive jurisdiction to determine costs, expenses and reasonable compensation for services rendered in reorganization proceedings (Bankruptcy Act, §§62, 241-250), and there are set forth numerous meticulous provisions designed to make effective the control of the Federal court over fees and expenses. Allowances under chapter 10 may be made only after a hearing upon notice to the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate (§247). No longer are allowances fixed in a hearing confined solely to the attorneys in interest, but under chapter 10 interested parties enjoy the statutory right to appear and be heard (§206 [U. S. Code, tit. 11, §606]). In addition, attorneys

seeking compensation must file a statement under oath showing whether they have acquired or transferred claims against or stock of the debtor after the commencement of the proceeding, and no compensation can be allowed to any attorney who, after assuming to act in that capacity, has purchased or sold claims or stock of the debtor (§249). Also an attorney seeking compensation must by affidavit inform the Federal court whether he has made any agreement with any person for a division of his compensation (§62). If allowances and fees could be awarded in the State courts, all these elaborate provisions for a notice and hearing to all the parties interested, and prohibition against attorneys dealing in claims against the estate of the debtor could be evaded, and fees in as many State courts as there were assets of the debtor which should be collected therein, would be fixed without regard to the amount of the total expenses and assets as a whole, since the State court is dealing only with particular claims and cannot have adequate knowledge of what will comprise the entire estate [fol. 192] as to assets and total costs, expenses and fees. * * *

"The control provided by the Bankruptcy Act over costs and expenses of administration, particularly including fees and allowances, is an important part of the entire reorganization and bankruptcy system. The system aims to provide maximum protection and relief for embarrassed or insolvent debtors consistent with protection and fairness to creditors and security holders. If the system is to work with satisfaction, there must be a proper balance giving on the one hand fair remuneration to those who administer the system, and on the other hand a limitation upon the total cost of administration, so that the Act in operation does not become too expensive. Centralized control over expenses incident to reorganization in bankruptcy to supplant State and Federal equity proce-

dures, so as to reduce the cost of corporate reorganization, was one of the forces making for the enactment of the reorganization and bankruptcy statutes. (*Callaghan* v. *Reconstruction Finance Corp.*, 297 U. S. 464.) The importance of this centralized control over expenses incident to reorganization is seen in the provision of the Act (§258 [U. S. Code, tit. 11, §658]) providing that administration allowances for services rendered in State or Federal court proceedings, later supplanted by a reorganization proceeding, must be determined not in the court supervising the prior proceeding but in the reorganization court. (*Matter of Keystone Realty Holding Co.*, 117 F. (2d) 1003.)

"The Bankruptcy Act and chapter 10 show congressional intent to treat a reorganization proceeding not as ordinary litigation between private parties, but as involving rights and interests of many members of the general public who are usually unrepresented or inadequately represented in the proceeding. As the Supreme Court of the United States has indicated, these statutory provisions are de- [fol. 193] signed to facilitate the participation of these various interests in matters in which they have a vital concern, and in any event furnish, so far as possible, safeguards for their protection. (*Securities & Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434.)"

POINT IV.

There is no conflict between the decision of the state court herein and applicable decisions of this and other federal courts.

It has uniformly been held that attorneys appointed by courts to bring suits in other courts to recover on claims should look to the appointing courts for the fixation of their compensation:

Watkins v. *Sedberry*, 261 U. S. 571, 575;
Page v. *Rogers*, 211 U. S. 575, 581;
Fanning v. *Pope*, 76 F. (2d) 707, 709;
In re Stemper, 222 Fed. 690, 692;
Davidson v. *Friedman*, 140 Fed. 853.

In numerous cases attorneys have applied to bankruptcy or reorganization courts to fix their fees for prosecuting actions in state courts,* but diligent research has failed to reveal even one case in which a state court has attempted to fix the amount to be paid for services of attorneys appointed in a bankruptcy or reorganization proceeding to conduct litigation in behalf of the estate in a state court.

All the cases cited on this point by the Attorneys involved actions on claims arising before the bankruptcy or reorganization. None of them involved the fixing of the fees of attorneys for services rendered upon appointment

* See *In re Evans*, 117 Fed. 574; *In re McKenna*, 137 Fed. 611; *In re J. M. Fiske*, 269 Fed. 982; *In re Cheney*, 300 Fed. 465; *In re Levinson*, 19 F. (2d) 253; *Watters* v. *Hamilton Gas Co.*, 29 F. Supp 436, 477 (¶71, 72-3).

by a bankruptcy or reorganization court. None involved a debt or expense of administration governed by section 62 and 241 of the Bankruptcy Act.

The facts in *Sherman* v. *Buckley*, 119 F. (2d) 280, and *New York Creditmen's Assn.* v. *Schlesinger*, 126 F. (2d) 472, differ from the facts in this case in the following respects: the attorneys were not appointed by the bankruptcy court; their services were rendered to bankrupts *before* the bankruptcy proceedings were initiated; their claims were not debts or expenses of administration; the attorneys had contingent contracts and were not permitted to prosecute the claims to judgment—they were wrongfully discharged. (*New York Creditmen's Assn.* v. *Schlesinger* is the case referred to in the state court as *Cup Craft Paper Corp.* v. *Federal Paper Board Co.*)

The New York Court of Appeals distinguished the foregoing cases from the case herein, as follows (R. 128, 129):

> "Respondents rely upon the cases of *Sherman* v. *Buckley* (119 F. 2d 280, cert. den., 314 U. S. 657) and *Cup Craft Paper Corp.* v. *Federal Paper Board Co.* (262 App. Div. 91, appeal dismissed, 288 N. Y. 529). In both of these cases the attorneys were not appointed by the Bankruptcy Court, but were retained and their services were rendered to the bankrupts and the liens arose, before the bankruptcy. While it is true that in *Sherman* v. *Buckley* (*supra*) the attorney continued as an attorney of record after the bankruptcy, there is nothing in the record to show that any services were rendered by him after the bankruptcy and before the substitution of attorneys, and no claim was made by him for services after the initiation of the bankruptcy proceeding. In addition, the attorneys in both of these cases were discharged

and not permitted to complete the services for which they had been employed under a single contract of contingent retainer, whereas the attorneys herein were permitted fully to perform the services for which they were appointed, namely to reduce the claims to judgment. Also in the *Sherman* and *Cup Craft* cases the claims for services were provable as debts of the bankrupt and were not within the statutory provisions regulating allowances for services in the administration of a reorganization or bankruptcy estate. As already noted, in the case at bar the attorneys were appointed by the court pending the reorganization proceeding to perform services as [fol. 194] agents and appointees of the court. The allowances for the attorneys were administration expenses covered by the allowance provisions of the Bankruptcy Act."

In *In re Prudence Co.*, 96 F. (2d) 157, the attorney had been employed by the debtor before the initiation of the reorganization proceeding. His services were not performed under appointment by the reorganization court. Nevertheless, although not a debt or expense of administration, the attorney made *application to the reorganization court* for the allowance of his claim!

The other cases cited by the Attorneys in Point I (Petitioners' Brief, pp. 1 to 6) involved claims by outside persons against bankrupts and debtors, or their property, which arose before the initiation of the bankruptcy or reorganization proceedings. None involved debts or expenses of administration.

The contention that the federal reorganization court waived its jurisdiction, is without merit. The New York Court of Appeals stated as to this contention (pp. 127, 128):

> "If we are correct in holding that the jurisdiction of the Federal court to determine these fees is exclusive, then it would seem clear that no waiver by the Federal court under the circumstances in the case at bar has been attempted."

In any event, the jurisdiction of the federal district court over such matters of administration as the fixing of fees for services in connection with the administration of the estate, cannot be delegated. See *U. S. Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 217, 218; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 739; *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 344.

Section 241 of the Bankruptcy Act expressly puts upon the reorganization judge the duty of fixing the fees of attorneys appointed by him to assist the trustees in the administration of the estate. It is the discretion of the district judge—not the discretion of any other person or tribunal—which the statute demands. The district judge cannot avoid this obligation by delegation to another court. He cannot even delegate it, under a plan, to the trustees or committees in the proceedings (*Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285).

Even if the reorganization judge had power to delegate this important administrative function, he could, at most, delegate only his own power. He could not evade the clear mandate of statute and court rule by delegating the matter to another court free from the restrictions imposed upon him by Sections 62, 206, 247 and 249 of the

Bankruptcy Act and General Order in Bankruptcy 44. The requirements of these statutes and rules were not met in the proceeding in the state court.

The cases on the proposition that a governmental agency which submits a controversy to a court for determination is bound by the judgment therein, do not apply. The controversy submitted by the Trustees to the jurisdiction of the state court in the action against the Reynolds officers and directors had nothing to do with the controversy between the Attorneys and the Trustees as to which court should fix the fees of the Attorneys. The Trustees are bound by the judgment in the *Reynolds* action, but that judgment did not cover the fees of the Attorneys—and could not cover such fees (only statutory costs in favor of the Trustees could be, and were, included). The proceeding of the Attorneys for the fixation of their fees was an entirely separate proceeding, with different parties, and involving different issues. *Peri* v. *New York Central Rr.*, 152 N. Y. 521, 526.

The cases, such as *Foust* v. *Munson S. S. Lines*, 299 U. S. 77, cited by the Attorneys in Point II (Petitioners' Brief, p. 7), dealing with an abuse of discretion in a lower federal court in refusing permission to litigate issues in a state court, are not relevant because: (1) they all relate to claims against a bankrupt or debtor or against its property arising before the bankruptcy or reorganization proceeding—they were not debts or expenses of administration; and (2) in each case it was a higher federal court which reviewed such discretion—no case holds that a state court may take jurisdiction without permission of the federal court.

The cases cited by the Attorneys in Point III (Petitioners' Brief, pp. 8 to 12), dealing with the difference in jurisdiction, under Section 23 of the Bankruptcy Act, of a court in proceedings under Section 77B and Chapter X, are clearly not in point. Section 23 does not deal with proceedings for the allowance of administration expenses but with the institution of separate plenary suits brought by trustees in bankruptcy against outside parties on claims which arose in favor of the bankrupt before the institution of the bankruptcy proceeding. In any event, Chapter X was applicable to the controversy between the Attorneys and the Trustees, because such controversy arose in 1941—more than three years after the provisions of Chapter X applied "in their entirety" to this reorganization proceeding (Section 276c(1) of the Bankruptcy Act).*

The Trustees request that the petition for a writ of certiorari be denied.

JOHN GERDES,
JAMES D. CARPENTER, JR.,
As Trustees of Reynolds Investing Company, Inc., Debtor, Pro Se, Respondents.

JOHN GERDES,
MARY-CHASE CLARK,
Of Counsel.

August 31, 1943.

* The petition in the reorganization proceeding was not approved until January 19, 1939, after Chapter X took effect on September 22, 1938.

APPENDIX.

Constitution and Statutes.

State Statutes.

NEW YORK JUDICIARY LAW, SECTIONS 474 AND 475.

§474. *Compensation of attorney or counsellor.*

The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, * * *

§475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Federal Constitution.

ARTICLE I, SECTION 8, CLAUSE 4.

The Congress shall have Power To establish * * * and uniform Laws on the subject of Bankruptcies throughout the United States;

Federal Statutes.

JUDICIAL CODE, SECTION 256
(28 U. S. C. A. 371).

Exclusive jurisdiction of United States courts. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *

Sixth. Of all matters and proceedings in bankruptcy.

FEDERAL BANKRUPTCY ACT.

SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

SEC. 62. EXPENSES OF ADMINISTERING ESTATES; UNAUTHORIZED SHARING OF FEES; WITHHOLDING ALLOWANCES. a. The actual and necessary costs and expenses incurred by officers in the administration of estates shall, except

where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred. * * *

c. A custodian, receiver, or trustee or the attorney for any of them, or any other attorney, rendering services in a proceeding under this Act or in connection with such proceeding, shall not in any form or guise share or agree to share his compensation for such services with any person not contributing thereto, or share or agree to share in the compensation of any person rendering services in a proceeding under this Act or in connection with such proceeding, to which services he has not contributed: *Provided, however*, That an attorney-at-law may share such compensation with a law partner or with a forwarding attorney-at-law, and may share in the compensation of a law partner.

d. A custodian, receiver, or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this Act or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provisions of this subdivision, the court shall withhold all compensation from such petitioner.

Federal Bankruptcy Act.

Sec. 111. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

Sec. 114. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

Sec. 206. The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. * * *

Sec. 216. A plan of reorganization under this chapter— * * *

(13) may include provisions for the settlement or adjustment of claims belonging to the debtor or to the estate; and shall provide, as to such claims not settled or adjusted in the plan, for their retention and enforcement by the trustee or, if the debtor has been continued in possession, by an examiner appointed for that purpose; * * *

Sec. 221. The Judge Shall Confirm a Plan if Satisfied that— * * *

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge

and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; * * *

SEC. 241. The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act. * * *

SEC. 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

SEC. 243.—The judge may allow reasonable compensation for services rendered and reimbursement for proper

costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto.

SEC. 244. Where a petition is filed under section 127 of this Act, the judge may allow, if not already allowed, reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in the pending bankruptcy proceeding—

(1) by a marshal, receiver, or trustee, as provided in subdivision g of section 48 of this Act, and the attorneys for any of them;

(2) by the attorney for the petitioning creditors;

(3) by the attorney for the bankrupt; and

(4) by any other persons and the attorneys for any of them entitled under this Act to compensation or reimbursement in such bankruptcy proceeding.

SEC. 245. Where a petition is filed in a pending bankruptcy proceeding, the judge may allow reasonable compensation for services rendered and the proper costs and expenses incurred in such bankruptcy proceeding by a referee in bankruptcy. In fixing such compensation, the judge shall not be restricted by the provisions of section 40 of this Act.

Federal Bankruptcy Act.

SEC. 246. Upon the dismissal of a proceeding under this chapter, or the entry of an order adjudging the debtor a bankrupt, the judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such proceeding prior to such dismissal or order of adjudication by any persons entitled thereto, as provided in this chapter, and shall make provision for the payment thereof, and for the payment of all proper costs and expenses incurred by officers in such proceedings.

SEC. 247. The judge shall fix a time of hearing for the consideration of applications for allowances, of which hearing notice shall be given to the applicants, the trustee, the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate, except that, in the case of allowances for services and reimbursement in a superseded bankruptcy proceeding, notice need be given only to the applicants, the debtor, the trustee, and the unsecured creditors, and may be given to such other classes of creditors or other persons as the judge may designate. In the case of the dismissal of a proceeding under this chapter and the entry of an order therein directing that bankruptcy be proceeded with, notice of the hearing to consider allowances need not be given to stockholders.

SEC. 248. In the case of the dismissal of a proceeding under this chapter and the entry of an order therein directing that a superseded bankruptcy be proceeded with, the compensation allowed by the judge, in the course of the proceeding under this chapter, to the referee, marshal, receiver, or trustee in the bankruptcy proceeding for services rendered by them in such bankruptcy

proceeding shall be deemed to have been allowed in such bankruptcy proceeding, and such compensation shall be considered in connection with the making of future allowances therein or shall be readjusted, so as to comply with the provisions of this Act fixing their compensation in a bankruptcy proceeding.

SEC. 249. Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter, shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred.

SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act [title], be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

SEC. 258. The judge shall make such provision as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and

for the payment of the reasonable costs and expenses incurred therein as may be allowed by the judge.

SEC. 276 c. The provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings;

General Orders in Bankruptcy.

Order 44.

APPOINTMENT OF ATTORNEYS.

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney. * * *